IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 494 of 1994
CRIMINAL APPEAL No 712 of 1994
and
CRIMINAL APPEAL No 854 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JALUJI TITAJI B
Versus
STATE OF GUJ

Appearance:
1. Criminal Appeal No. 494 of 1994
MR LM CHHABLANI for Appellant
MR KG SHETH, APP for Respondent No. 1
2. Criminal Appeal No. 712 of 1994
MR KG SHETH, APP for Appellant
MR KR RAVAL for Respondent No. 1
3. Criminal Appeal No. 854 of 1994
MR KR RAVAL for Appellant
MR KG SHETH, APP for Respondent No.1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 09/04/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. These three appeals arise out of a judgment and order rendered by Additional Sessions Judge, Sabarkantha Camp Modasa in Sessions Case No.80 of 1992 on March 21st, 1994. Before the Sessions Court, Bhuriben Keshaji and Jaluji Titaji were prosecuted for offences punishable under Sections 302, 114 and 120-B of the I.P.C. for having committed murder of minor Ramesh Keshaji aged 7 years, Veena Keshaji aged 5 years and Mukesh Keshaji aged 3 years, sons and daughter of Bhuriben. The learned Additional Sessions Judge convicted both the accused for the offence punishable under Sections 302, 120-B and 114 of the I.P.C. and sentenced them to undergo R.I. for life and to pay a fine of Rs.300/- each and, in default, to undergo R.I. for two months.

1.1 Aggrieved by the said judgment and order, the original accused no.1 Bhuriben has preferred Criminal Appeal No.854 of 1994 and original accused no.2 is the appellant in Criminal Appeal No.494 of 1994 and they pray for acquittal.

1.2 The State, aggrieved by the sentence, has preferred Criminal Appeal No.712 of 1994 praying for enhancement of sentence and imposition of capital punishment.

2. Since all the three appeals arise out of the same judgment and order, they are heard together and are disposed of by this common judgment.

3. The facts of the case in brief can be stated thus:

3.1 The appellant Bhuriben is married to Keshaji Arjanji and from that wedlock, she had delivered three children Ramesh, Veena and Mukesh aged 7, 5 and 3 years respectively. They stay at Village Suka Vatda of Taluka Bayad. It is alleged that original accused no.2 appellant Jaluji Titaji was staying in a house nearby and was a distant uncle of Keshaji Arjanji. It is also alleged that Bhuriben and Jaluji had developed illicit

relations and since they wanted to marry and since according to Jaluji Titaji, the three children were coming in their way, both the accused persons hatched a conspiracy and in furtherance of that conspiracy, Bhuriben pushed all the three children on 17th May, 1992 at about 1700 hours into an unused well of Navnitbhai Patel in the outskirts of Dhansura and then fled away. The accused Jaluji also fled away from his house.

3.2 On the relevant day i.e. 17th May, 1992, it is the case of the prosecution that Keshaji had come to his home from his workplace situated somewhere in Bhavnagar district. He and his father Arjanji had gone to the field in the afternoon. Keshaji's mother Champaben had gone to a relative's place and the accused Bhuriben was at home with her three children. When Keshaji and Arjanji returned home in the evening and found that Bhuriben and the children were not there, they enquired from the neighbourhood and were told by Kailasben Lebaji that she had seen Bhuriben going away with the children towards the bus-stand. Thereafter, whereabouts of Bhuriben were not known and, therefore, Keshaji and his family members started searching for Bhuriben and the children. They enquired at the place of sisters of Bhuriben at village Morali and Shimlaj. On finding Bhuriben at the house of Madhiben and on having noticed that children were not there, it was enquired of her as to where the children were. It is the case of the prosecution that initially she informed that the children had met with a vehicular accident and were crushed under a truck. Somehow, it appears that the relatives were not satisfied with the explanation and they further interrogated her. Then she told them that she had pushed all the three children into a well. She then took all of them to the concerned well of Navnitbhai Patel at Dhansura and the three dead bodies were found floating in the well. The police was informed, complaint was lodged, the dead bodies were removed and post-mortem was performed. It was found that the children had died of Asphyxia due to drowning. Certain facts were disclosed by Bhuriben in the interrogation and the Investigating Officer, therefore, deemed it fit to send her to the Forensic Science Laboratory for undergoing the Polygraph Test. The police also arrested accused Jaluji Titaji and also sent him to the Forensic Science Laboratory for undergoing the said test, popularly known as lie-detection test.

3.3 At the end of the investigation, having found sufficient material against the accused persons, the investigating agency filed a chargesheet in the Court of

JMFC, Modasa. The JMFC, Modasa, after following the procedure, committed the case to the Court of Sessions, Sabarkantha at Himatnagar and was registered as Sessions Case No.80 of 1992.

4. The learned Additional Sessions Judge framed charge at Exh.5 and the accused persons pleaded not guilty to the charge. The learned Additional Sessions Judge, after considering the evidence led by the prosecution, came to the conclusion that the prosecution was successful in establishing the charge against the accused persons and he, therefore, recorded the conviction and sentenced the accused persons, as stated above.

5. We have heard the learned advocate Mr. K.R. Raval appearing for the accused appellant Bhuriben in Criminal Appeal No.854 of 1994, learned advocate Mr. Chhablani appearing for the accused appellant Jaluji Titaji in Criminal Appeal No.494 of 1994 and learned Additional PP Mr. K.G. Sheth appearing for the appellant State in Criminal Appeal No.712 of 1994. We have closely scrutinised the record and proceedings and have considered the contentions raised by the learned advocates for the parties.

6. Learned advocate Mr. Raval has taken us through the entire evidence. His main contention is that the whole case depends on circumstantial evidence. There is no direct evidence. So far as circumstantial evidence is concerned, Mr. Raval submitted that excepting the statement made by the appellant Bhuriben before the officer of the F.S.L. conducting the lie-detection test and discovery of the well and the dead bodies and the so-called extra-judicial confession, there is no other evidence to inculpate Bhuriben. Mr. Raval submitted that the statement made before the officer of the F.S.L. is not admissible in evidence and cannot be considered against the appellant as it is hit by Section 26 of the Indian Evidence Act. Mr. Raval submitted that the prosecution witnesses come out with different and inconsistent versions. Whether Bhuriben was traced at village Morali or at village Shimlaj or at village Hemroj is not surely established. Madhiben, from whose place appellant Bhuriben was lastly found, has not been examined. Mr. Raval submitted that this discrepancy assumes greater importance because the complaint is lodged at a belated stage and no legitimate explanation is tendered by the prosecution. Mr. Raval submitted that the discovery of well or the dead bodies from the well cannot be considered as a discovery envisaged under

Section 27 of the Indian Evidence Act for the reason that everybody was aware about the well and the dead bodies lying in the well. Mr. Raval submitted that as regards the extra-judicial confession also, different versions are coming. It is stated by some witnesses that Bhuriben initially explained that the children were crushed under the truck and later on, it is said that the children were thrown into the well by Bhuriben. Mr. Raval submitted, therefore, that neither the discovery panchnama nor the extra-judicial confession nor the statement made before the F.S.L. officer could have been considered by the learned Additional Sessions Judge and except for these reasons, there is no evidence whatsoever to connect the accused appellant Bhuriben with the offence. Mr. Raval, therefore, urged that the appeal may be allowed and Bhuriben may be acquitted of the charge levelled against her.

7. Mr. Chhablani, learned advocate appearing for the appellant in Criminal Appeal No.494 of 1994 has, in substance, adopted the arguments advanced by Mr. Raval. He only added that so far as appellant Jaluji is concerned, his name figures for the first time in the statement of accused Bhuriben made before the officer of the F.S.L. This statement was made while the appellant accused Bhuriben was in custody and, therefore, it cannot be proved against her as it is hit by Section 26 of the Indian Evidence Act. Mr. Chhablani submitted that barring this, there is absolutely no evidence against the accused appellant Jaluji and, therefore, he may be given a clean acquittal.

8. The learned Additional PP Mr. Sheth submitted that there is no substance in the above appeals. The learned Additional Sessions Judge has considered and evaluated the evidence in its proper perspective. He submitted that the officer of the F.S.L. is not a police officer and the statement before her has rightly been considered by the learned Additional Sessions Judge. Mr. Sheth submitted that here is a case where the accused hatched a conspiracy of doing away with three minor children only to clear their path of maintaining illicit relations. Mr. Sheth submitted that three minor helpless children acting in full trust and faith towards their mother have been done to death and, therefore, this case ought to have been considered as one of the rarest of rare cases where the sentence should have been that of capital punishment. Mr. Sheth, therefore, urged that the appeal by the State may be allowed and the appeals preferred by the convicts may be dismissed.

9. In reply to the contentions raised by Mr. Sheth, learned advocates Mr. Raval and Mr. Chhablani both submitted that as has rightly been observed by the learned Additional Sessions Judge, this case cannot be considered as a rarest of rare case, even if conviction is found to be sustainable. The appellant Bhuriben is a rustic villager and there is no material to indicate that she would be a menace to the society, if not awarded with capital punishment. They, therefore, urged that even if the court finds that the conviction is sustainable, the sentence may not be disturbed.

10. We have gone through the record and proceedings and evidence. We are in full agreement with the contention of Mr. Raval that the case is one of circumstantial evidence but we do not agree with the contention that the prosecution has not been able to establish the chain of circumstances connecting convict appellant Bhuriben with the offence. Our conclusion is founded on the reasons that would be recorded in the paragraphs to follow.

11. There is no dispute about the fact that all three children namely, Ramesh, Veenaben and Mukesh aged 7, 5 and 3 years respectively, died of drowning.

12. There is evidence of Keshaji Arjanji (Exh.9) and Arjanji Suraji (Exh.22) to indicate that they had gone to their field on the fateful day i.e. May 17th, 1992. Then, there is evidence of Kailasben Lebaji (Exh.24) who says that she had seen Bhuriben going away towards the bus-stand with all three children. Then there is evidence of Lalliben Ramanbhai (Exh.29), Shivaji Kulaji (Exh.30), Jalamji Suraji (Exh.31), Pratapji Baluji (Exh.32), Bhalaji Lebaji (Exh.34), Babaji Magaji (Exh.35) and Ramaji Danaji (Exh.36). All these witnesses indicate that when Bhuriben was interrogated regarding the children, she initially said that the children had met with an accident and were crushed under a truck but later on, she told that she had pushed the children into a well and then she took the people to the well in question at Dhansura, which is at a distant place.

13. We have closely scrutinised these depositions. We find that the witnesses are consistent and have remained unshaken in the cross-examination. In fact, we find that there is no cross-examination so far as the extra-judicial confession and showing of the well is concerned.

13.1 It is true that there is some discrepancy about

the fact whether Bhuriben was found at village Morali or Hemroj or Shimlaj but that aspect gets cleared, if all depositions are taken together. The deposition of Reshamben Jalamji (Exh.27) indicates that initially Bhuriben was found at village Morali but since the children were not there, she was asked to come with the children and then she was brought from Shimlaj and on being questioned, she disclosed the incriminating part namely, having pushed the children in the well. In our opinion, therefore, it hardly remains significant whether Bhuriben was brought from Shimlaj or Morali or Hemroj because all the witnesses consistently say that after she was brought, on being questioned, she disclosed the fact of having pushed the children in the well and then she showed the well wherefrom the dead bodies were found.

13.2 The removal of dead body is established by the deposition of Karsanbhai Nathabhai (Exh.25) who says that the three bodies were removed from the well alongwith a slipper.

14. Having given a thoughtful consideration to the contentions raised, we are of a firm view that the witnesses are reliable and their depositions regarding extra-judicial confession made by Bhuriben before them of having pushed the children in the well and then discovery of the dead bodies from the well connects Bhuriben with the death of three minor children. Added to this is the fact that Kailasben Lebaji (Exh.24) had seen Bhuriben going away with the children. In our opinion, therefore, even ignoring the statement made by Bhuriben before the officer of the F.S.L., the guilt of Bhuriben is established by the circumstances. In fact, in our opinion, the learned Additional Sessions Judge erred in relying on the statement of Bhuriben made before the officer of the F.S.L. (Exh.44). The said statement could not have been looked into for the reason that it is hit by Section 26 of the Indian Evidence Act. Bhuriben was in custody. In fact, she was on police remand and, therefore, such statement is a statement which would be hit by Section 26 of the Indian Evidence Act. But as discussed above, even ignoring the said statement, the prosecution has established the guilt of appellant Bhuriben.

15. So far as the case against appellant Jaluji is concerned, we find that there is absolutely no evidence against him except the statement (Exh.44) made by Bhuriben before the officer of the F.S.L. As stated above, that statement is inadmissible and cannot be looked into and barring that, there is no evidence and,

therefore, Jaluji deserves a clean acquittal.

16. Now, coming to the question of quantum of punishment. It is true that three minor children were done to death by Bhuriben who happens to be none less than mother of the children. The incident occurred on 17th May, 1992. Today is 9th April, 2002. Almost 10 years have lapsed. During this entire period, she is in incarceration. It is also to be noted that we do not have any material to satisfy ourselves that she is a menace to the society and if not awarded with capital punishment, the protection to the society would stand withdrawn. Therefore, we feel that this cannot be labelled as one of those rarest of rare cases where capital punishment is required to be awarded by allowing the appeal by the State.

17. In view of the foregoing discussion, the appeal preferred by convict appellant Bhuriben bearing Criminal Appeal No.854 of 1994 stands dismissed. The appeal preferred by the State for enhancement of sentence bearing Criminal Appeal No.712 of 1994 also stands dismissed.

18. Criminal Appeal No.494 of 1994 preferred by Jaluji Titaji Bamaniya is allowed. The judgment and order passed by Additional Sessions Judge, Himatnagar in Sessions Case No.80 of 1992, impugned herein, hereby stands quashed to the above extent. The appellant Jaluji Titaji Bamaniya be set at liberty forthwith, if not required in any other case.

(M.C. Patel, J.)

(A.L. Dave, J.)

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